ANWAR IBRAHIM

v.

ABDUL KHALID & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-40-1998]
13 SEPTEMBER 2000

EVIDENCE: *Criminal conviction - Whether admissible in civil proceedings - Rule in Hollington v. Hewthorn - Whether to be followed - Whether criminal conviction amounted to a relevant fact*

CIVIL PROCEDURE: *Amendment - Defence - Inclusion of reported case together with criminal charges and sentence - Whether amendment must relate back to date of original pleading*

The plaintiff was at all material times a member of Parliament, Deputy Prime Minister and Finance Minister, as well as the Deputy President of the United Malays National Organisation ('UMNO'). The 1st defendant authored a book entitled "50 Reasons Why Anwar Cannot Become The PM" while the 2nd defendant was the publisher of the book.

The plaintiff sued for damages for libel and conspiracy and also sought an injunction and costs.

Parties to these proceedings had closed pleadings, entered the case for trial, obtained an order for summons for directions and also had filed their respective affidavits verifying the list of documents. At this stage, the defendants applied to amend their defence. The ground for amendment by the defence is that they had dropped the plea of justification and instead had cited a reported case against the plaintiff together with the criminal charges and sentence which has been affirmed by the Court of Appeal.

This application to amend was opposed by the plaintiff on several grounds, *inter alia:* (i) conviction in a criminal trial cannot be used as evidence in a civil case by virtue of the provisions in the Evidence Act 1950; (ii) any amendment must relate back to the date of the original pleading; and (iii) a criminal conviction cannot be used as evidence of fair comment and justification because the comment must be at the time of publication.

Held:

[1] With regard to ground (i), the conviction of the plaintiff for corruption is a fact in issue. The plaintiff therefore will have sufficient opportunity to explain the charges and the conviction in this civil case. Further, since the claim is for libel, the character of the plaintiff is vital to the question of damages. The defendants must be given the liberty to plead all relevant facts that would be relevant towards mitigating damages.

[2] The defendants have referred to a decision of the court (and subsequently affirmed by the Court of Appeal) wherein the plaintiff has indeed been charged and convicted of corrupt practices which was the very essence of the defendants' allegation against the plaintiff which led to the filing of this suit. Surely the defendants ought not to be precluded from amending their defence to include the charges and the conviction.

[3] With regard to ground (ii), as the conviction was introduced as a fact in issue in this case and does not form the basis for a cause of action, the objection does not stand.

[4] With regard to ground (iii), whilst the court held that for a plea of justification the party that pleads can rely on facts which happened subsequently, a similar decision cannot apply to a plea of fair comment. However, from the defence it cannot be ascertained if the plea of conviction is sought to be included in support of the defence of fair comment or justification or qualified privilege.

[5] As the conviction is a fact in issue, the argument that the appeal by the plaintiff against his conviction to the Federal Court is pending and that therefore the decision is not final is unacceptable since the appeal does not mean the guilty verdict is put aside or the plaintiff innocent.

[Application allowed.]

Case(s) referred to:

Cohen v. Daily Telegraph Ltd [1968] 2 All ER 407 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 ***(refd)***
DP Vijandran v. PP [1999] 1 CLJ 691 ***(refd)***
DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ Supp 433 ***(refd)***
Hollington v. F Hewthorn Co Ltd [1943] All ER 35 ***(dist)***
Jorgensen v. New Media (Auckland) Ltd [1969] NZLR 961 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(refd)***
Ramanathan Chelliah v. Penyunting, The Malay Mail & Anor [1998] 2 CLJ 691 ***(foll)***
Simetech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd [1992] 1 CLJ 509 ***(dist)***

Legislation referred to:
Emergency (Essential Powers) Ordinance No. 22 of 1970, s. 2(1)
Evidence Act 1950, ss. 40, 41, 42, 43
Penal Code, ss. 193, 354, 420
Rules of the High Court 1980, O. 34

For the applicants - Shamsul Bahrain Ibrahim; M/s Skrine
For the respondent - Hj Sulaiman Abdullah (Leela J Jesuthasan); M/s Faiz & Co

Reported by Yow Ting Fong

JUDGMENT

RK Nathan J:

Facts

The plaintiff was at all material times a Member of Parliament, Deputy Prime Minister and Finance Minister of Malaysia, as well as the Deputy President of the United Malays National Organisation (UMNO), which is the main component party of the Barisan Nasional, the ruling party in Malaysia. The defendant authored a book entitled "50 Dalil Mengapa Anwar Tidak Boleh Jadi PM". Translated it means "50 Reasons Why Anwar Cannot Become the PM" (the book). The 2nd defendant was the publisher. The plaintiff alleged that the defendants had in the book *inter alia* used words and expressions that conveyed the meaning that he, the plaintiff, is a homosexual, that he is a traitor to his race and country and to the leaders, that he had committed adultery with the wife of his confidential secretary and that there is a child born of that illicit relationship, that he is "Bapak Rasuah" because he had indulged in corrupt practices when he was the Finance Minister. The plaintiff sued for damages for libel and conspiracy and also sought an injunction and costs.

In their joint defence the defendants pleaded justification and averred their intention to adduce evidence to substantiate their allegations.

In the course of case managing this suit, parties had closed pleadings, entered the case for trial, obtained an order for summons for directions and also had filed their respective affidavits verifying the list of documents. The defendants then at this stage applied to amend their defence. This application to amend was forcefully opposed by the plaintiff.

Findings Of The Court

The defendants' reason for amendment as I gather from the submission of Encik Shamsul, is that they had dropped the plea of justification and instead had cited the reported case against the plaintiff that is, *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215 (the criminal charge) together with the charges and the sentence. This decision has been affirmed by the Court of Appeal (see *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2000] 2 CLJ 695 CA).

The Criminal Charge

The plaintiff (the accused) was charged with four counts of corrupt practices under s. 2(1) of The Emergency (Essential Powers) Ordinance No. 22 of 1970 (the Ordinance). In essence, the charges as subsequently amended, alleged that the accused, whilst being a member of the administration, had unlawfully used his public position to his advantage, in that he had directed two senior police officers to obtain four written statements from Azizan Abu Bakar (Azizan) and Ummi Hafilda Ali (Ummi) denying their allegations of sexual misconduct and sodomy against him, and had by that saved himself from embarrassment and from criminal proceedings, in contravention of s. 2(1) of the Ordinance. Before the learned Judge, evidence had been led which showed that: (i) the allegations in question were made by Azizan through a declaration (exh. P14C) and by Ummi through a report meant for the Hon. Prime Minister (Exhibits P14A and B); (ii) following the circulation of P14A, B and C, the accused had regularly summoned Dato' Mohd Said and Dato' Amir Junus, who were senior Special Branch officers, to his office and official residence; (iii) the accused had *inter alia* told the two police officers that he did not want any publicity on the matter, and further, had requested them to locate and "gempar" Azizan and Ummi and obtain from each of them, firstly, a written statement addressed to the Hon. Prime Minister denying their allegations in P14A, B and C, and secondly, a public statement addressed to himself denying the same allegations; and (iv) the two police officers had carried out the request of the accused, with the result that Azizan and Ummi were interrogated by the Special Branch and were coerced into signing retraction letters (exhs. P17 and P18) and public statements (exhs. P20 and P22). The facts further showed that during the course of police investigations into P14A, B and C, the accused had lodged two police reports (exhs. P16 and P56) pertaining to the booklets "Talqin Terbuka" and "Buku 50 Dalil" (which had similar contents as P14A, B and C), and soon thereafter, the police Criminal Investigation Department (the CID) headed by SAC Musa started its investigation into P16 and P56. In the

event, it was SAC Musa's contention that the accused had instructed him to prematurely stop the investigation on P15 and P56 and had thereby saved himself from possible prosecution. Having heard all the evidence the court found the accused guilty on all four charges and sentenced him to six years imprisonment in respect of each of the four charges with the sentences to run concurrently from the date of conviction. It was the case of the defence that since the contents of exh. P14A in the criminal charge actually represented the contents of part of the book, they were justified in relying on the case, the charges and the conviction.

Whether Conviction In Criminal Trial Can Be Used As Evidence In A Civil Case?

Tuan Haji Sulaiman for the plaintiff referred me to s. 43 of the Evidence Act 1950. The said section reads as follows:

> 43 Judgments, etc other than those mentioned in sections 40 and 42 when relevant.
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> Judgments, orders or decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

It is therefore also necessary to reproduce ss. 40, 41 and 42 of the Evidence Act. They read as follows:

> 40 Previous judgments relevant to bar a second suit or trial
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> The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.
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> 41 Relevancy of certain judgments in probate, etc jurisdiction
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> (1) A final judgment, order or decree of a court, in the exercise of probate, matrimonial, admiralty or bankruptcy jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing is relevant.
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> (2) Such judgment, order or decree is conclusive proof –
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> (a) that any legal character which it confers accrued at the time when the judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when the judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which the judgment, order or decree declared that it had ceased or should cease; and

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which the judgment, order or decree declares that it had been or should be his property.

42 Relevancy and effect of judgments, orders or decrees other than those mentioned in section 41

Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

The plaintiff relied heavily on *Hollington v. F. Hewthorn Co Ltd* [1943] All ER 35. To consider this very pertinent issue it is necessary for this court to relate the facts of the case in *Hollington*. There the plaintiff's car, driven by his son, was involved in a collision with the defendant's car. The son having died subsequently, the plaintiff sued the defendant for the damages occasioned to his car and also sued as the administrator of the estate of the deceased son, for personal injuries sustained by the son. The defence counterclaimed. At the close of the plaintiff's case the defence submitted no case to answer and elected to call no evidence. Judgment was however given for the plaintiff for both the claim and the counterclaim. The defendant appealed. The plaintiff not only sought to uphold the judgment but contended that a certificate that the defendant's driver had been convicted of driving without due care and attention on the day and place in question was wrongly rejected by the court. However, the Court of Appeal held that a certificate of a conviction cannot be tendered in evidence in civil proceedings and that on a subsequent civil action the court should come to a decision on the facts before it without regard to the proceedings before another tribunal.

In *Hollington*, since the son had died the plaintiff was unable to establish negligence against the defendant. Since the onus of proof of negligence rested with the plaintiff, he sought to achieve this by tendering the certificate of a conviction of the defendant's driver. However, the Court of Appeal was of the view that the conviction is only proof that another court has considered that the defendant's driver was guilty of careless

driving and just as the opinion of a bystander who had a full view of an accident is not relevant, similarly on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant. In *Ramanathan Chelliah v. Penyunting, The Malay Mail & Anor* [1998] 2 CLJ 691 I was also called upon to apply the principle laid down in *Hollington*. The plaintiff sued the defendant for libel. In the course of the trial, counsel for the defendants wanted to tender evidence of the plaintiff's conviction for an offence under s. 354 of the Penal Code, relying on a defence of justification and fair comment. Section 354 of the Penal Code relates to a charge of assaulting or using criminal force to outrage the modesty of a person. The news reported by the Malay Mail also related to matters concerning the person whose modesty was found to have been outraged by the plaintiff. In *Ramanathan* I went through the numerous cases and decided not to follow the rule in *Hollington*. It is relevant to cite a passage from pp. 696/697 of my judgment. It reads as follows:

The Voices Of Dissent

> Even before statute intervened to put an end to the rule in *Hollington v. Hewthorn* voices of dissent and rumblings of discontent were beginning to be heard against the rule in *Hollington v. Hewthorn*. Counsel arguing for the plaintiff in *Hollington v. Hewthorn* was none other than Mr. Denning KC (as his Lordship then was). However when he sat in the Court of Appeal in *Goody v. Odhams Press Ltd* [1967] 1 QB 333 Lord Denning MR voiced *per incuriam* the view that the principle of *Hollington v. Hewthorn* although binding upon him should be reconsidered. In *Goody*'s case the plaintiff sued the defendant for libel contained in a newspaper article. The plaintiff was described by the defendant as one of the persons who had taken part in The Great Train Robbery for which he had been convicted of conspiring to stop a mail train, being armed at the material time with an offensive weapon, and with robbery of 120 mail bags. The trial resulted in the plaintiff being found guilty and receiving a sentence of 30 years imprisonment. The defendants pleaded full justification saying that the words complained of were true in substance and in fact. However, because of the rule in *Hollington v. Hewthorn*, that a conviction is no evidence of guilt, the defendants amended their defence to plead the partial justification that in so far as the words complained of alleged that the plaintiff was in prison for 30 years and his appeal disposed of, they were true in substance and in fact.
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> Lord Denning, the crusader, made the first dent in the rule in *Hollington v. Hewthorn* when he held that the words of the plea of partial justification in the amended defence, being severable from the rest of the article, were admissible, and under it the defendants could prove the plaintiff's conviction and sentence. He also held that previous convictions within a relevant period of the plaintiff's life being cogent evidence that he had a bad reputation, were admissible in evidence in mitigation of damages.

> I cannot but agree with the views expressed by the then Master of the Rolls. The strange rule in *Hollington v. Hewthorn* means that if anyone publishes a story about a crime, he is in peril of being sued for libel and in the course of defending that action he cannot rely on the conviction as proof of guilt. He has to prove it all over again. I hold the view that such a conviction is *prima facie* evidence of guilt. If the plaintiff wishes to rebut it he is entitled to do so by giving evidence. But the defendant when raising the defence of justification or fair comment is clearly entitled to rely on the conviction.

In *Ramanathan*, I accepted and adopted the view of the New Zealand Court of Appeal in *Jorgensen v. News Media (Auckland) Ltd* [1969] NZLR 961 which held that a certificate of Jorgensen's conviction is not merely conclusive evidence of the fact that Jorgensen had been found guilty of the murder of Speight but also is admissible evidence, whilst not conclusive, of the fact of guilt of the crime charged against Jorgensen at the time and place named in the indictment. Whether such evidence discharges the evidentiary burden of proof at any stage is for the trial court to decide on the whole of the evidence tendered at that stage. In *Ramanathan* I had said that the Evidence Act 1950 does not deal with the operative function of a previous conviction in relation to a subsequent civil proceeding in respect of the matter relating to or arising from the earlier criminal conviction and that therefore I had to adopt the common law approach. Indeed there was no need for me to resort to the common law approach. I had in *Ramanathan* overlooked the provision of s. 43 of the Evidence Act 1950. Clearly the conviction of the plaintiff herein for corruption is a fact in issue since whilst the 1st defendant has accused the plaintiff of indulging in corrupt practices the plaintiff had denied the same. The plaintiff therefore will have sufficient opportunity to explain the charges and the conviction in this civil case. Further as held by me in *Ramanathan*, since the claim is for libel, the character of the plaintiff is vital to the question of damages. The defendants must be given the liberty to plead all relevant facts that would be relevant towards mitigating damages.

In *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ Supp 433, D.P. Vijandran had sued Karpal Singh for damages for libel when the latter gave a press statement alleging that D.P. Vijandran had issued him a cheque in settlement of taxed costs due to him, out of a closed clients' account and thereby contending that D.P. Vijandran's conduct in issuing a cheque which was dishonoured, amounted to a serious offence of cheating under s. 420 of the Penal Code and further stating that D.P. Vijandran's conduct was dishonourable and rendered him unfit to be on the rolls of advocates and solicitors in the country. The defendant sought to tender a reported

judgment of a criminal case against the plaintiff (*DP Vijandran v. PP* [1999] 1 CLJ 691 CA). In that case the plaintiff D.P. Vijandran was charged for a criminal offence under s. 193 of the Penal Code and convicted and sentenced to a term of imprisonment of one month and a fine of RM2,000 or in default, a term of imprisonment of two weeks. He successfully appealed against the said conviction and sentence. However, in its reported judgment the Court of Appeal made a finding that D.P. Vijandran was the male actor in a pornographic video tape tendered in evidence. In the course of the trial the defendant attempted to show by means of the findings of the Court of Appeal, that the plaintiff was not of sound character and thereby mitigating against the award of damages. Whilst it is legitimate to attack the characters of a plaintiff in defamation suits I said at p. 455 of the judgment as follows:

> Whilst the report and the matters stated therein stand towards the test of time, if the 1st defendant or any of the defendants had intended to pursue the finding of the Court of Appeal that the plaintiff was the actor in the pornographic video, then even if no amendment had been applied for, the defendants could have with leave of the Court applied to cross-examine the plaintiff on that allegation, indicating to the court that the purpose of the cross-examination would be to mitigate damages. The plaintiff ought to have been given the opportunity to explain. He cannot be condemned in this court upon a finding by another court without he being given the opportunity to either explain himself or to inculpate himself. In fact, it is appropriate to quote a passage from Dr. B. Malik's *Practical Hints on Cross-Examination* (3rd Ed, 1991). This is what he said at p. 715:
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> > In actions for defamation, it is always legitimate to attack the character of the plaintiff, whether or not he becomes a witness in his own behalf. This question in such cases is one of sound tactics rather than of professional ethics. The plaintiff's character is directly material on the issue as to how much he has been damaged by what the defendant has said or written of him. Hence, the manner in which he may be handled by opposing counsel is to be clearly distinguished from pure cross-examination to credit.
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> Clearly the defendants ought to have pursued with their cross-examination on this aspect with the plaintiff. In the circumstances, for the purposes of the action before me I will have to disregard the comments of the Court of Appeal with regard to the plaintiff's character.

What the defendant in *DP Vijandran*'s case was trying to do was to admit a certain passage from the judgment of the Court of Appeal as evidence. This he cannot do. But there was nothing to have prevented the defendant from cross-examining the plaintiff on the point and re-establishing it in the subsequent libel proceedings, which the defendant failed to do. In the

case before me the defendants have referred to a decision of the Court (and subsequently affirmed by the Court of Appeal) wherein the plaintiff has indeed been charged and convicted of corrupt practices, the very essence of the defendants' allegation against the plaintiff which led to the filing of this suit. Surely the defendants ought not to be precluded from amending their defence to include the charges and the conviction. Of course if left as such this court will no doubt give it as much weight as it gave to the conviction in *DP Vijandran*'s case. The defendants must give the plaintiff an opportunity to explain the conviction under cross-examination.

Amendment To Date Back To Date Of Original Pleading

Tuan Haji Suleiman referred me to *Simetech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd* [1992] 1 CLJ 509 and argued that as the amendment must relate back to the date of the original pleading, and since there was no conviction at the time the original statement of claim was filed, this amendment ought not to be allowed. I think counsel has misunderstood the rationale behind *Simetech.* In *Simetech* the defendant was the main contractor. The plaintiff agreed to execute a certain sub-contract work. Claiming completion, and upon non-payment by the defendant the plaintiff sued for a sum due under the contract. Before the defence was filed the plaintiff amended the statement of claim to include a larger sum and applied for summary judgment. This increased sum was based on the final accounts as stated by the consulting engineer. The defendant disputed this and submitted the last architect's payment certificate issued before the statement of claim was filed. The plaintiff then produced copies of the architects' certificate of payments issued after the statement of claim was filed. The plaintiff then applied to amend claiming the increased figure. The learned senior assistant registrar allowed judgment for the plaintiff but on appeal the learned judge held that on the principle that since the amendment relates back to the date of the original statement of claim and no new cause of action accruing since the original statement of claim was filed would be allowed, the plaintiff was denied the right to seek summary judgment for the additional sum which became due and payable to the plaintiff only after the date of the issue of the writ and statement of claim. In the case before me, the conviction was introduced as a fact in issue. It does not form the basis for a cause of action.

Conviction At Time Of Publication

Tuan Haji argued that a criminal conviction cannot be used as evidence of fair comment and justification because the comment must be at the time of publication. In support, he relied on *Cohen v. Daily Telegraph Ltd* [1968] 2 All ER 407. The plaintiff *Cohen* sued the defendants for libel

for a statement published on 19 May 1967. The defendants pleaded fair comment and regarding particulars of the facts on which they said their comment was based they narrated facts that took place before the article was published on 19 May 1967 but in two paragraphs they set out matters which took place after the article was published. The plaintiff then took out a summons to strike out those facts contending that on a plea of fair comment, the comment must be on existing facts and not on future events. Whilst the court held that for a plea of justification the pleader can rely on facts which happened subsequently, a similar decision cannot apply to a plea of fair comment.

Having read the amended statement of claim I find that whilst Encik Shamsul is recorded in the notes as having said that he had "dropped the plea of justification" I cannot see that he has. The very fact that he intends to rely on the fact of conviction must mean that he is relying on justification. Upon a reading of the defence and the amended defence I cannot for myself ascertain if the plea of the conviction sought to be included is in support of the defence of fair comment or justification or qualified privilege because the defence has not linked the conviction to any of these defences. What to my mind the plaintiff ought to have done would have been to tie the defence down with interrogatories. As I said the conviction is a fact in issue. The argument that the appeal by the plaintiff against his conviction to the Federal Court is pending and that therefore the decision is not final is unacceptable. A court of competent jurisdiction has found the plaintiff guilty of four counts of corruption. This has been upheld by the Court of Appeal. That is the resulting verdict. An appeal to the Federal Court does not mean that the guilty verdicts are put in limbo or that the plaintiff is deemed innocent.

As to whether there will be any prejudice to the plaintiff if the amendment is allowed, I cannot see any. I have yet to fix a date for trial let alone set the case down for trial in compliance with O. 34 of the Rules of the High Court 1980. I am still at case management stage. The plaintiff will be allowed the right to make consequential amendments and will also be compensated with costs. In the circumstances, I allow the defendants' application and grant the plaintiff costs to be agreed to or taxed.